UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STANLEY WHITNEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-65-P-H***
	)	
WAL-MART STORES, INC.,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON CROSS-MOTIONS IN LIMINE AND MOTION TO CONSOLIDATE

The parties have filed motions *in limine* concerning damages and the defendant has filed a motion to consolidate this action with another filed by the plaintiff in state court and subsequently removed to this court by the defendant, arising out of the same events that gave rise to this action. I limit recoverable damages as set forth below and deny the motion to consolidate the cases.[1]

Following the district court's adoption of my recommended decision on the parties' motions for summary judgment, Docket No. 61, a final pretrial conference was held at which it became clear that the plaintiff's conception of available damages on his claim under the Family Medical Leave Act ("FMLA"), specifically 29 U.S.C. § 2617(a), differed significantly from that of the defendant, Report of Final Pretrial Conference and Order (Docket No. 76) at [1]-[3]. The parties were instructed to file any motions *in*

[1] The plaintiff's requests for oral argument or, in the alternative, for leave to file a further reply to the defendant's motion *in limine* regarding damages, expressed during a telephone conference with United States Magistrate Judge Kravchuk on March 25, 2004 (Docket No. 86), is denied.

limine on this issue by March 17, 2004 and responses by March 24, 2004 with no further pleadings on that issue. *Id*. at [5]. Those motions have been filed and are now before the court for resolution, along with the defendant's request for consolidation of the two actions which was filed in the interim. With respect to that request, Judge Kravchuk, who conducted the final pretrial conference, noted that "if this case were submitted to the jury solely on the issue of whether or not there was a FMLA violation (the factual dispute developed on the summary judgment record) and the court determined that damages were capable of computation as a matter of law in the event of liability, then possibly it [makes] sense not to consolidate the cases." *Id*. at [4].

The parties apparently now agree that the plaintiff's travel expenses are not recoverable on his FMLA claim, Wal-Mart Stores Inc.'s Motion in Limine Regarding the Measure of Damages Under the FMLA ("Defendant's Motion") (Docket No. 80) at 4; Plaintiff's Reply to Wal-Mart's Motion in Limine Regarding Damages ("Plaintiff's Reply") (Docket No. 83) at 2; that the plaintiff's claim for liquidated damages is to be decided by the court, Defendant's Motion at 7; Plaintiff's Reply at 3; and that no claim for front pay is before the court, Defendant's Motion at 6-8, Plaintiff's Reply at 5. There is no need at this time for the court to consider any contentions concerning attorney fees under the FMLA, despite the defendant's discussion of this issue. Defendant's Motion at 8-9.

The parties agree that the position held by the plaintiff at the time he first took the leave at issue in this case has been defined by the defendant since October 2002 in a written job description as requiring 48 to 52 hours of work per week.[2] Plaintiff's Reply at 3. The plaintiff contends that he was told by his

[2] The plaintiff contends that "based on his experience with the position" he could perform the job "in less than 45 hours per week except during certain peak periods," Plaintiff's Motion in Limine Regarding the Computation of Plaintiff's Damages Under the FMLA ("Plaintiff's Motion") (Docket No. 81) at 2 n.3, but an employer is entitled to set the number of hours during which it expects a particular employee to be present on its premises, regardless of how efficiently he does (*continued on next page*)

supervisor on February 1, 2002 not to return to work until he could would 48 to 52 hours per week. Plaintiff's Motion at 2. The parties also agree that the plaintiff was restricted to 40 hours of work per week with two consecutive days off by his medical provider as of January 28, 2002 and to 45 hours of work per week with two consecutive days off as of March 5, 2002. *Id*. at 1, 3; Exh. A to Defendant's Motion.

The parties disagree on the date on which the plaintiff's 12 weeks of FMLA leave would have expired if he had been allowed to take it intermittently, for the hours in excess of 40 or 45 per week after January 28, 2002, when he was prepared to return to work; the defendant contends that it would have expired by mid-May or mid-July 2002, Exh. A to Defendant's Motion at 3, and the plaintiff contends that it would have expired on August 22, 2002, Plaintiff's Motion at 3. It is not necessary to resolve this dispute at this time. The plaintiff's claimed entitlement to additional damages under the FMLA is based on his assertion that he could have used his accumulated vacation pay after that date to cover any hours in excess of 45 per week required by the position until November 15, 2002 when a new 12-week allotment of FMLA leave would have become available to him. Plaintiff's Motion at 3. In other words, the plaintiff contends that he should have been allowed to hold his original position indefinitely, working no more than 45 hours per week and always having two consecutive days off per week, by using FMLA leave and vacation leave, so that he is entitled to damages for the hours over 45 per week running from February 2002 until he is reinstated in his original job.

This argument fails on its merits. In *Hatchett v. Philander Smith College*, 251 F.3d 670 (8th Cir. 2001), the plaintiff contended that she would have been able to return to work by the time her 12 weeks of

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his work. This would seem particularly important when the employer is engaged in retail sales and service.

FMLA leave expired if her employer had allowed her to return to work on a reduced schedule, gradually building up to full-time work. 251 F.3d at 676. The court held that

> the legislative history of the FMLA and the statute's restoration provisions demonstrate that an employee who could not otherwise perform the essential functions of her job, apart from the inability to work a full-time schedule, is not entitled to intermittent or reduced schedule leave.
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> * * *
>
> The purpose of the FMLA is to allow an employee to be away from the job, as opposed to using the statute as a means to force an employer to be directly involved in an employee's rehabilitation.

Id. at 676-77. Similarly, the FMLA cannot reasonably be interpreted as providing a means to force an employer to continue to employ a particular person in a particular position indefinitely after that individual becomes unable to work the full number of hours required by the position. *Cf. Johnson v. Moundsvista, Inc.*, 2002 WL 2007833 (D. Minn. Aug. 28, 2002), at *6 n.6 (noting that this issue remains unresolved in Seventh and Eighth Circuits). The plaintiff cites a document published by the Equal Employment Opportunity Commission interpreting the Americans with Disabilities Act, and regulations issued under that Act, in support of his contention that the defendant should have at least offered him another position that provided equivalent pay and benefits, Plaintiff's Reply at 4, but that is a very different statute with a different purpose.[3] Its requirements may not be read into the FMLA.

Even if the plaintiff's position were not incorrect on the merits, his proposed method of computing damages should not be allowed in this case because he never informed the defendant that he intended to rely on his "vacation time" theory until the final pretrial conference, despite the existence of timely discovery

[3] The FMLA does allow an employer to transfer an employee temporarily to an available alternative position with equivalent pay and benefits when intermittent leave "is foreseeable based on planned medical treatment." 29 U.S.C. § 2612(b)(2). There is no evidence in the record in this case to suggest that the plaintiff would be undergoing medical treatment during each of the three to seven hours per week and second consecutive days off to which he contends his FMLA leave should be applied. Nor has the plaintiff identified any such position available at Wal-Mart at the relevant (*continued on next page*)

requests from the defendant that required that he inform the defendant of this theory much earlier in the case. The theory was not mentioned in the letter from the plaintiff's attorney that was identified in his initial disclosure as presenting his computation of damages, Plaintiff's Initial Disclosure (Exh. 1 to Affidavit of Lisa F. Bendetson ("Bendetson Aff.") (Exh. A to Defendant's Reply to Plaintiff's Motion in Limine (Docket No. 84))), and no documents supporting it — at a minimum, the defendant's vacation leave policy — were apparently presented at the plaintiff's deposition despite a clear request for such documents in the notice of deposition, Defendants' Notice to Take Oral Deposition of Plaintiff, Stanley Whitney (Exh. 2 to Bendetson Aff.) ¶ 8. The notice of deposition indicated, in emphasized language, that the request for production of documents was a continuing request for supplementation, *id*. at 3, but no supplementation was ever provided, Bendetson Aff. ¶ 4.

Under these circumstances, the plaintiff should not be allowed to proceed with his new theory of damages. *See generally Keeler v. Hewitt*, 697 F.2d 8, 12-14 (1st Cir. 1982) (trial court did not err in refusing to instruct jury on theory of liability not raised until eve of trial); *Ehrenfeld v. Webber*, 499 F. Supp. 1283, 1294-95 (D. Me. 1980) (declining to consider damages claim first raised on eve of trial); *Currier v. United Techs. Corp.*, 2003 WL 22799669 (D. Me. Nov. 21, 2003), at *5 (prohibiting party from using at trial documents requested in discovery but first produced on eve of trial). The prejudice to the defendant is clear, as is the disregard of plaintiff's counsel for the rules of procedure. Even if the new theory had merit, therefore, the plaintiff should not be allowed to present it.

There is no need at this time to decide the precise amount of FMLA damages available to the plaintiff or to choose the precise date on which his FMLA leave would have expired had he returned to

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time.

work on a reduced schedule of hours as he claims he should have been allowed to do.[4] Such decisions may be reached and such calculations may be performed, if necessary, after a determination that the FMLA was violated has been made by the jury. At this time, it is appropriate to grant the defendant's motion *in limine* only to the extent of determining that the plaintiff will not be allowed to seek FMLA damages beyond August 22, 2002 at the latest.[5] The plaintiff's motion *in limine* is denied.

With respect to the request for consolidation, the issues for trial in the instant case have been narrowed considerably by my decision concerning damages available on the plaintiff's FMLA claim. As the plaintiff points out, this case also includes a breach-of-contract claim in connection with which he seeks to recover "expenses incurred . . . in seeking new employment," Plaintiff's Reply at 2, damages which are not available on his FMLA claim. Still, the damages available in this action differ significantly from those available in the plaintiff's second action against the defendant, which asserts claims under the Maine Human Rights Act. Second Amended Complaint, *Stanley Whitney v. Wal-Mart Stores, Inc.*, Docket No. 04-38-P-H ("*Whitney II*") (Exh. B to State Court Record, Docket No. 4), at 5-6, 7.

There is an obvious factual overlap between the two cases, and the plaintiff has made no attempt to explain his decision to bring the FMLA claim before the administrative process involving his state human-rights claim had been completed, despite the lack of any issue of statute of limitations or other apparent reason for haste in asserting the FMLA claim. However, consolidation of the two cases at this point would necessarily result in months of delay in resolving the FMLA case, as the second case is only at the initial

[4] In brief, while I reject the plaintiff's theory of damages based on the use of vacation time, the appropriate resolution of the parties' dispute as to the precise date on which the plaintiff's FMLA leave would have expired is not apparent at this time, based on the record before the court.

[5] The defendant also seeks an *in limine* ruling, Defendant's Motion at 2-9, on the following issues, which need not be addressed at this time: whether FMLA damages are capped at the equivalent of 12 weeks' wages or salary; whether liquidated damages are available and, if so, whether they should be awarded; whether equitable relief is available under (*continued on next page*)

stages of discovery. Scheduling Order, *Whitney II* (Docket No. 6). While the plaintiff's choice to bring his claims to court in piecemeal fashion is not to be condoned,[6] on balance, I conclude that the FMLA case should not be further delayed until the second case is ready for trial. As the defendant notes, Wal-Mart Stores, Inc.'s Reply to Plaintiff's Objection to Defendant's Motion for Continuance and Motion to Consolidate (Docket No. 74) at 3-4, questions of claim and issue preclusion may arise in the second action if it is not consolidated with this action for trial. Given the limited nature of the claims to be tried in each action, however, resolution of such questions in the second action should not require a major commitment of the court's time and effort. Indeed, such an effort should narrow the issues presented in the second case.

In both of the cases cited by the defendant in support of its position on this issue, the possibility that resolution of one of the two cases sought to be consolidated would be significantly delayed by the consolidation was not at issue. In *Norris v. Cincinnati Bell Tel. Co.*, 2002 WL 31556519 (S.D. Ohio Oct. 24, 2002), the plaintiff did not oppose the defendant's motion to consolidate the case which the defendant had removed from state court, asserting only state-law claims, with her federal case that asserted claims under ERISA, the ADA and the federal Age Discrimination in Employment Act. *Id*. at *1. In *Vorhees v. Time Warner Cable Nat'l Div.*, 109 F.Supp.2d 384 (E.D. Pa. 2000), the plaintiff herself sought consolidation of two cases she had filed in federal court, one seeking relief under the FMLA and the other seeking relief under the ADA and state law. *Id*. at 385. The defendant sought dismissal of the second action on the ground that the claims should have been raised in the first action; the motion to dismiss was denied. *Id*. at 386-88.

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the circumstances of this case and, if so, in what form; and whether attorney fees should be awarded to the plaintiff if he is successful on his FMLA claim.

[6] It should be noted in this regard that the plaintiff chose to bring his state-law human rights claims in state court, not in this court. It was the defendant that removed the second action to this court.

Neither *Norris* nor *Vorhees* supports consolidation here over the objection of the plaintiff. I reluctantly conclude that the instant case should go forward as presently scheduled for trial.

Conclusion

For the foregoing reasons, the plaintiff's motion *in limine* (Docket No. 81) is **DENIED**; the defendant's motion *in limine* (Docket No. 80) is **GRANTED** only to the extent that damages available on the plaintiff's claim under the Family Medical Leave Act are limited to those incurred up to a date no later than August 22, 2002; and the defendant's request for a continuance and consolidation of this case with Docket No. 04-38-P-H is **DENIED**. Issues otherwise raised by the defendant's motion *in limine* are reserved for decision at trial, if necessary.

Dated this 30th day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

STANLEY WHITNEY

represented by **CURTIS WEBBER**
LINNELL, CHOATE & WEBBER, LLP
P. O. BOX 190
AUBURN, ME 04212-0190
784-4563
Email: cwebber@lcwlaw.com

V.

Defendant

WAL-MART STORES INC represented by **LISA FITZGIBBON BENDETSON**
THOMPSON & BOWIE
3 CANAL PLAZA
P.O. BOX 4630
PORTLAND, ME 04112
774-2500
Email:
lbendetson@thompsonbowie.com

MARK V FRANCO
THOMPSON & BOWIE
3 CANAL PLAZA
P.O. BOX 4630
PORTLAND, ME 04112
774-2500
Email: mfranco@thompsonbowie.com